JULY 6, 1858

ALEXANDER and JAMES MORGAN, *Appellants*, *v.* JOHN and WILLIAM MORRIS, PETER WANLESS and Others, *Respondents*.

Jury Cause—Verdict, Amendment of—Not proven—Question of Succession—Process—*A question of succession having been tried on issues—*(1) *whether one of the pursuers was nearest and lawful heir of the deceased J. M.; and* (2) *whether both the pursuers were next of kin of the deceased, the jury returned a general verdict of "not proven," which was afterwards applied by the Court of Session as adverse to the pursuers. On appeal, the House of Lords reversed the judgment of the Court of Session, on the ground that the verdict was uncertain, inasmuch as it did not shew whether the jury considered that the pursuers had failed in proving both the issues, or only one of them, and remitted the cause back to the Court of Session to do therein as should be just. Thereafter the Court of Session amended the verdict by adding a finding, which it considered to be conform to the meaning and intention of the jury. On a second appeal:*

HELD, *That the Court of Session was wrong in amending the verdict, and that it should have ordered a new trial.*

When a jury return a verdict which is ambiguous, the proper course is for the Judge not to receive it, but to send it back for the jury to find specific questions under the issues, and the Court cannot afterwards alter it by speculating as to the supposed meaning of the jury. If a mere mistake has been made by an officer of the Court in entering the verdict, the Court has an inherent power to correct that; but the Court cannot make a new verdict for the jury.[1]

See previous appeal, *Morgan* v. *Morris*, *ante*, p. 591; 2 Macq. Ap. 342.

A. and J. Morgan now appealed against the judgments of the Court of Session of February 1856, maintaining in their case that they ought to be reversed—"1. Because the interlocutors appealed against were inconsistent with the judgment of reversal of the House of Lords of 26th July 1855, and the grounds on which it proceeded; and the Court of Session were bound to give effect to these grounds, and at once to have refused to amend the verdict, and to have granted a new trial. 2. Because, assuming that the competency of moving for an amendment of the verdict had been still open, by the law and practice of Scotland there was no power to amend the verdict of a jury after it had been engrossed, read over in presence of the Judge and Jury, and finally approved of; more especially there was no such power *ex tanto intervallo* as occurred in the present case. 3. Because the case of *Marianski* v. *Cairns* (24 Sc. Jur. 579; 25 Sc. Jur. 186) was, in any view, a special and exceptional case, and could have no application to the present. More particularly, (1) Had it been a precedent, the House of Lords would undoubtedly have so found, and would have dealt with the present case in the same way, and pronounced the same orders. (2) *Marianski's case* was a case of plain and palpable *fraud*, and this House was justified in using every means to put a stop to the litigation, and to frustrate the attempt of Marianski fraudulently to carry off funds, to which he had no honest claim. (3) The form of issue in *Marianski's case* was the fixed style employed in Scotland in all such cases, and a general verdict having been given for the pursuers, this House properly used every means to protect the established form of proceeding in Scotland, by preventing, if possible, the necessity of a new trial. (4) It was dealt with as a case of clerical error, of which there cannot be the slightest pretence in the present case. (5) The circumstances in the *case of Marianski* generally, and the form of the proceedings, were much more favourable for allowing an amendment of the verdict than in the present case."

The respondents in their case supported the judgments on the following grounds:—"1. Because it was within the power and competency of the Court below to correct or amend the entry of the verdict, so as to adapt it to the truth and reality of the case. 2. Because the Court below had the clearest and most ample materials for correcting or amending the entry of the verdict in the form and manner adapted to the truth and reality of the case; and because justice required that the correction or amendment should be made."

Solicitor-General (Cairns), and *Anderson* Q.C., for the appellants.—The Court of Session has no power to amend an ambiguous verdict, and if it has the power, it has improperly exercised such a power in the present instance. The Court of Session has, at most, no greater power to

[1] See previous reports 18 D. 797; 27 Sc. Jur. 602; 28 Sc. Jur. 263. S. C. 3 Macq. Ap. 323: 30 Sc. Jur. 686.

amend ambiguous verdicts than an English Court of common law, and the latter has no such power at all. Indeed, there is no inherent power to amend any kind of vérdicts at common law, but some statutes have granted powers to correct clerical errors.—See *Bristow* v. *Wright*, 1 Sm. L. C. 587. Such statutes, however, do not extend to Scotland, and cannot be imported. At most, the power granted by statute is to correct an erroneous entry of the verdict, and does not extend to altering the verdict itself. Thus if the clerk, on entering up the verdict, misinterpreted what the jury said, that may be put right, provided it can be clearly established what it was that the jury meant. But when a jury give a verdict which is in its terms ambiguous, that is a vice of substance, and incurable,—the only remedy being a new trial. If a Judge could correct an ambiguous verdict, there would be little use in a jury at all. In Scotland a verdict once given becomes a matter of record instantaneously. It is not, as in England, a mere minute made at the time, to be afterwards engrossed on the *postea;* but it is entered on the record before the jury leave the box. After the verdict is given, you cannot go back to the Judge's notes, or any previous stage, in order to qualify the verdict.—*Watt*, Shaw's Just. C. 128; *Sinclair*, *Ibid.* 138; *Hunter*, 2 Swint. 1; *Kirk* v. *Guthrie*, 1 Murr. 278; *Walker*, 4 S. 323; Adams on Jury Trial, 294. In *Berry* v. *Wilson*, 4 D. 139, Hope, J. C., lays it down, that the verdict is the final declaration and measure of the right; and *Irvine* v. *Kirkpatrick*, 7 Bell's Ap. 186, 218, shews, that there is no power of amending a verdict once entered on the record. It is said that in *Marianski* v. *Cairns*, (1 Macq. 212, 776; 26 Sc. Jur. 635; *ante*, p. 146, 416,) the power of amending ambiguous verdicts was established, but that is a mistake. That was a peculiar case, and was based on certain assumed technicalities which had no existence in Scotland. Yet that case may be justified. All the evidence was one way, and the jury found a verdict which was general, including three alternative issues, the doubt being whether the verdict was distributive. It was merely a clerical error in entering the verdict.

[LORD CHANCELLOR.—There the verdict was not amended, but only the entry of the verdict.]

Yes, and therefore that case is no authority for what has been done here. 2. Even if the Court had the power of amendment, it must be so only on sufficient materials. In England applications to the Judge to amend the *postea* are generally made a few days, or at most a few weeks, after the trial, when the Judge may have the matter fresh in his mind; but here the Judge was applied to two and a half years after the trial. But there must be something more than memory to amend by; there must be some writing or definite facts to recur to. The Judge's notes could only shew what the Judge intended to say to the jury, but not what the jury thought or intended. If the Judge had put specific questions to the jury, and got specific answers, and then the officer of the Court, in entering the verdict, gave a wrong construction to those answers, the verdict could, on reference, at any distance of time, be put right. Here there is no clerical error, for the very words the jury used are entered up, which was all that the officer could do. Those words are essentially ambiguous. They may mean that the first issue was proved, but not the second, or *vice versâ*. The Judge's notes could obviously throw no light upon what was in the minds of the jury. Moreover, the amended verdict was as bad as the original verdict. The Court has merely appended what it assumes to be a logical corollary. It proceeds on the fallacy, that only one question could occupy the minds of the jury, viz., whether the pursuer's father was the brother of the intestate's father, whereas there were other questions, viz., whether the descendants of other brothers were extinct. The Court, therefore, acted *ultra vires* in attempting to alter this verdict. It had less power than an English Court to amend. It is said that in *Short* v. *Coffin*, 5 Burr. 2730, and *Richardson* v. *Mellish*, 3 Bing. 334, the Court amended a verdict, but those were cases merely of misentry by the clerk. Other cases, such as *Spencer* v. *Goter*, 1 H. Bl. 79, and *R.* v. *Woodfall*, 5 Burr. 2661, shew, that such an amendment cannot be allowed. The interlocutor of the Court below ought, therefore, to be reversed, and a new trial, which was the only remedy, ordered.

Lord Advocate (Inglis), and *Sir R. Bethell* Q.C., for the respondents.—The Scotch procedure in jury trial is founded entirely on English procedure. A memorandum of the verdict is taken at the trial, and afterwards indorsed on the record. If between the verdict and the indorsement it were suggested, that the verdict did not truly represent what took place, or ambiguously stated it, the Court would be able to set that right. All Courts have an inherent power to correct mistakes of this kind—see *Mellish* v. *Richardson*, 1 Cl. & Fin. 224; and a Court of review will not interfere with such amendments, if made—*Per* Tenterden, C. J. *ibid.* It is peculiarly a question for the discretion of the Court and Judge. The case of *Marianski* v. *Cairns* conclusively established the inherent power of the Court of Session to refer an ambiguous verdict to the Judge, to amend it by his notes, and that was a much stronger case than the present. There are previous cases—see *Kirk* v. *Guthrie*, 1 Murr. 271. There was, in fact, no difficulty in amending the present verdict, for one intention, and one only, could have been in the mind of the jury. The sole question for the jury was, whether the pursuer's father was the brother of the intestate's father.

[LORD CHANCELLOR.—Was there not a question also, whether one David Morgan was not a brother of the intestate's father?]

Only one relationship was alleged in the condescendence, and all the other claimants were more distant in degree. Therefore, that was the only case that the pursuers could prove under their issues.

[LORD CHANCELLOR.—Why so? The issue is general.]

The record in Scotland must shew with reasonable certanty, not only the material facts, but must shew in outline, how those facts are proposed to be proved. Hence, at the trial, no other line of evidence will be admitted but what is shadowed forth in the pleadings.

[LORD CRANWORTH.—Suppose a party prove his case, but in a different way from what is set forth in his pleading, would a jury in that case give a verdict contrary to their oath?]

The Judge would not admit the evidence at all. The Statute 6 Geo. IV. c. 120, §§ 6–10, lays down minute regulations for the condescendence and answers; and when the record is closed both parties are foreclosed against all allegations of new facts. This is now so clearly settled in the practice of the Courts, that no argument would be listened to against it, and hence it is difficult to produce authorities; but see *Househill Coal Co.* v. *Neilson*, 2 Bell's Ap. C. 1, where Lord Campbell, recognising the practice, says it secures against surprise. Therefore, one case only could be made by the pursuers here.

[LORD CRANWORTH.—The last time the case was here, it was suggested, that Alexander might not have been heir at law, for others might have been descended from a middle brother.]

There are two answers to that. Such a case was never, in fact, suggested or dreamt of at the trial, and it could not have been so under this record. In trials in Scotland regarding succession, the party who proves his propinquity is presumed to be the nearest, and is not bound to prove that all possible prior branches of the family are extinct—Stair, iii. 5, 35; Ersk. iii. 8, 66.

[LORD CHANCELLOR.—In England, if it appear that there is a preferable title in any other person, the claimant would not get a verdict.]

This trial comes in place of the old brief of service of heirs. If the jury were not satisfied on any ground that the claimant was the heir, they would not serve him. But there was no suggestion made here, that anybody else was or could be the heir; and, therefore, there was no necessity to prove the prior branches were extinct.

[*Anderson* here interposed, and pointed to parts of the evidence touching the existence of intermediate brothers between the respective ancestors.]

There may have been trivial allusions, but no serious point was made of that kind, and therefore the presumption, that the Morgans would be heirs and next of kin, if their father was a brother of the intestate's father, would apply.

[LORD CRANWORTH.—You say the issue is controlled by the record. I think that point has been several times mooted here, and discountenanced. Suppose here the pursuers had offered evidence to shew, that their father was brother of the intestate's father, and it turned out on cross-examination that he was only first cousin, would the jury have found that the pursuer was not the heir?]

If such proof were to be allowed, there would be no use in a condescendence and answers at all. To allow it would be to subvert the entire practice of the Courts below.

[LORD CRANWORTH.—Is the record in evidence before the Judge when he tries the issue?]

Certainly. Formerly it used to be the practice to draw up the issues in a more special form, but now that the record is more strictly prepared under statutory regulation, the issues are put in the form of general propositions, which are in practice qualified by the condescendence.

[LORD BROUGHAM.—You say, that any evidence tendered will not be allowed, though it is competent under the issue, provided it is inconsistent with the statements in the record?]

[LORD CHANCELLOR.—Suppose the House itself (as it may competently do) directed an issue on a record that came before it, do you mean to say, that, if competent evidence was tendered, it would be rejected, because the condescendence seemed to contemplate another mode of proving the title?]

Perhaps not in that case. Such an issue was directed in *M'Lean* v. *Officers of State*, 5 Bell's App. C. 60.

Anderson replied.—It is agreed, that the verdict was put on record in the very words used by the jury. Therefore it is vain to say, that if those words are ambiguous, any Court could amend that, there being no misprision or error of the officer of Court. *Mellish* v. *Richardson* does not prove, that if the Court or Judge choose to amend a verdict, a Court of error cannot look into that.—See *per* Bayley, J. 1 Cl. & Fin. 234. The House often listens to objections as to the defects in a record, as in *Stewart* v. *Gloag*, M'L. & Rob. 721, and other cases.

[LORD CHANCELLOR.—Suppose the Court below had the power to amend, and exercised that power, so as to make the verdict perfectly correct, would the House then listen to the objection and inquire into how the Court came to make the amendment?]

Yes. The House would inquire, especially where, as in this case, the verdict was originally ambiguous, which is an objection going to the substance of the case. This House will look into the way in which the Court below has dealt with the verdict, and the appellant will be entitled to shew, that the Court acted wrongly. *Marianski's case* does not prove any inherent

power in the Court to alter a verdict like this. It is said, that the verdict here can be amended, because the issue is controlled by the record, and that only one case could be proved by that record, and consequently only one intention could have been entertained by the jury. But it is a mere delusion to say, that the issue is controlled by the record. In tendering evidence, you are to look to the issue, and the issue alone, totally irrespective of any allegations in the record. The issue is the fruit of the record. The record is merely the machinery for arriving at the issue, and when the issue is arrived at, the function of the record is exhausted.—See *per* Lord Brougham in *Leys, Masson, and Co.* v. *Faulds*, 5 W.S. 404. The matter is quite settled, and in many late cases has been recognised. It is not the record that goes to trial; it is the issue. I wish to prove the issue *any how*, and the Court is bound to admit all competent evidence which I tender, whether or not I had previously stated in the record how I intended to prove it.—See *Macdonald* v. *Mackay*, 5 W.S. 462; *Gillan* v. *Mackinlay*, *ibid.* 468; *Berry* v. *Wilson*, 4 D. 139. Here it was not the whole case of the pursuers, that their father James was the brother of Thomas. There were other questions, such as whether the descendants of David and of William were respectively extinct. Here, therefore, it is impossible to say which of many things the jury meant. The English Courts have never gone the length of the present case. Adam (on Jury Trial, 285) expressly states, that ambiguity in a verdict cannot be cured by altering the terms of the verdict. Nothing but a new trial can, therefore, meet the necessities of this case.

Cur. adv. vult.

LORD CHANCELLOR CHELMSFORD.—My Lords, this appeal is one directed against various proceedings which have arisen out of a process of multiplepoinding raised at the instance of the judicial factor on the estate of John Morgan of Edinburgh, who died on the 5th of August 1850, leaving considerable property. Amongst the various claimants to the succession were the appellants, Alexander and James Morgan, who claimed to be first cousins of the deceased, and therefore nearer in degree of relationship to him than any of the other claimants.

On behalf of the appellants certain issues were framed by the Lord Ordinary to be tried by a jury—"*First*, whether the pursuer, Alexander Morgan, is nearest and lawful heir of John Morgan, sometime residing at Coates Crescent, Edinburgh, deceased? *Secondly*, Whether the pursuer, James Morgan, is, along with the said Alexander Morgan, next of kin of the said John Morgan, deceased?"

The issues came on for trial before the Lord Justice Clerk on the 16th of August 1853, when, after a three days' trial, the jury found "the case for the pursuers not proven."

Notices of motion were given by the parties respectively: on the part of the appellant, "To set aside or discharge the verdict, or refuse to apply it, or arrest judgment;" and on the part of the respondents, "To apply the verdict in this case, and, in respect thereof, to repel the claims of the said Alexander Morgan and James Morgan, and to find them liable in expenses, and to remit the account thereof to the Auditor to tax the same and to report." The Judges of the Second Division pronounced an interlocutor, repelling the claims of Alexander and James Morgan, and found them liable in expenses, and remitted the account, when lodged, to the Auditor to tax and report, and refused the motion of the pursuers, the said Alexander and James Morgan.

The appellants presented a petition of appeal to this House against the several interlocutors which had been pronounced in the course of the proceedings; and upon the appeal the question arose as to the finding of the jury upon the issues which had been directed respecting the claim of the appellants. The House, after hearing the case fully argued, declared, that the finding of the jury "is uncertain, inasmuch as it does not shew whether the jury considered, that the pursuers (appellants) had failed in proving both the said issues, or only in proving one of them; and it is ordered and adjudged, that the said interlocutors of the 23d November 1853, and of the 15th of February 1854, complained of in the said appeal, be, and the same are hereby, reversed: And it is further ordered and adjudged, that as respects the remainder of the interlocutors appealed against, the said petition and appeal be, and is hereby, dismissed this House: And it is also further ordered, that, with this declaration, the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this declaration and judgment."

The Judges of the Second Division of the Court pronounced the interlocutor of the 20th of February 1856, to which I shall presently refer more particularly; and upon this the entry was made of the corrected verdict by an interlocutor of the 21st of February 1856, in these terms:—"And a jury having been impannelled and sworn to try the said issues between the parties, say, upon their oath, that they find the case for the pursuers is not proven; and, therefore, that, upon the first issue, they find it is not proven, that the pursuer, Alexander Morgan, is nearest and lawful heir of John Morgan, sometime residing at Coates Crescent, Edinburgh, deceased; and, upon the second issue, that they find it is not proven, that the pursuer, James Morgan, is, along with the said Alexander Morgan, next of kin of the said John Morgan, deceased."

The questions which have been raised before your Lordships are—*First*, whether the Lords

of Session could amend the verdict at all; *secondly*, if they could, whether the amendment which has been made does not still leave the verdict uncertain; and *thirdly*, what is the proper course to adopt, under all the circumstances, to do justice between the parties.

It is necessary to bear in mind, that when this case was before the House upon the former occasion, the question of the power of the Judges in Scotland to amend the verdict was not raised at the bar nor considered by your Lordships, nor was the case remitted to the Court of Session for the purpose of their making any such amendment. On the contrary, two of my noble and learned friends now present intimated their opinion, that there had been a miscarriage of the jury which could only be rectified by a new trial.

My noble and learned friend LORD CRANWORTH said—"All that is important, in my view of the case, to establish, on the part of the appellants, is this, that the verdict does not necessarily shew, either that Alexander is not heir, or that Alexander and James are not next of kin. It only shews that the double proposition that Alexander is heir, and that Alexander and James are the next of kin, is not made out. That is consistent with the hypothesis, that though Alexander is not heir, yet that Alexander and James are next of kin. Then, if that is so, it seems to me quite impossible to say, that the claim of Alexander as heir, or of Alexander and James as next of kin, is disposed of, for the jury have returned a verdict that does not enable the Court to act. The verdict is a bad verdict, and in this country it would amount to what we should call a mistrial, not giving rise to the necessity of any motion for a new trial, but shewing a record upon which it was clear that the Court could not adjudicate, and upon which, according to our English Courts, there must have been a *venire de novo*, not what we technically call a 'new trial,' which always means a new trial ordered by the Court, but a new trial, because the trial that took place was a trial that did not enable the Court to act. I cannot entertain the slightest doubt in the world, therefore, that if this was an English case, there must have been a *venire de novo*, which would be equivalent in the Scotch process to a new trial." And again my noble and learned friend says—"Therefore I shall move your Lordships, that the interlocutor be reversed, and that the case be remitted back to the Court of Session with a statement, that there ought to be (they do not call it in Scotland a *venire de novo*, but) a new trial, in order to obtain a proper verdict."

My noble and learned friend LORD BROUGHAM said—"I am therefore clearly of opinion with my noble and learned friend, that in this case the judgment cannot stand, and that the interlocutors appealed from must be reversed, and that the case must be remitted to the Court below to direct a new trial."

My noble and learned friend LORD ST. LEONARDS was of a different opinion, and, while maintaining that the verdict was free from ambiguity, he considered that to order a new trial would be contrary to the provisions of the Scotch Judicature Acts.

When the case was remitted to the Court of Session there was no express direction, that a new trial should take place, in consequence of the counsel interposing, after your Lordships' opinion had been delivered, and suggesting that it would not be the proper form to direct a new trial, or to make any declaration respecting it. Your Lordships, that the case might not be prejudiced, acquiesced in this suggestion, and made the order remitting the cause back to the Court of Session in such a form as to leave the question open for the Court "to do therein as should be just and consistent with the declaration and judgment of the House." It now comes back with an alteration of the verdict, which, whether warranted or not by law, seems to leave the matter in the same unsatisfactory state as before.

Under these circumstances, your Lordships are, in the first place, called upon to consider the question, whether the Court of Session possessed the power not merely to amend the entry of the verdict, but to correct and alter the terms in which the verdict was pronounced by the jury. There is no inherent power in the Courts in this country to amend the verdict of a jury, although it must be competent to any Court to correct an erroneous entry of a verdict arising from the mistake or misprision of a clerk. The power of amending a verdict, or, to speak more correctly, of amending the *postea*, which is the record of the verdict, is not a power possessed by the Courts or the Judges of this country by common law, but is given to them by statutes, many of them of a very early date.

It does not appear that there is any act of parliament which has conferred this power upon the Courts in Scotland, and their authority in this respect cannot extend to the correction of a verdict, when once entered, so as to change it substantially from what was actually delivered by the jury, except under circumstances which do not touch the present case, such, for instance, as in the case of *Dalziell* v. *The Duke of Queensberry*, 4 Mur. 18, where the jury having given damages for matters which it was not competent to them to include in their verdict, the Court said it might be corrected without the expense of another trial.

The language of the Lord Justice Clerk in the *Don Fishery* case is inapplicable to the present question, because in the passage which was cited at the bar he was speaking of a clear and unambiguous verdict. His words are—"After the verdict has been returned and applied, it is incompetent to look into the notes of the evidence with a view to limit, define, control, or restrain

the legal rights established by the verdict. I say 'established,' for after it is applied, the verdict is the final declaration and measure of the right."

I cannot find that the Courts of Scotland have ever before taken upon themselves to amend a verdict in the manner and to the extent to which they have proceeded in the present case. The case of *Kirk* v. *Guthrie*, in 1 Murr. 271, was clearly an instance of a mistake in entering a verdict, which was properly corrected.

Marianski's case, 1 Macq. 214; *ante*, p. 146, upon which the greatest stress was laid at the bar, when rightly understood, will be found not to go beyond this. In that case the second issue, which is the only important one to be considered, was, "Whether the appellant, taking advantage of the settler's weakness and facility, did, by fraud, circumvention, or intimidation, procure the said subscriptions, or any of them?" There was a general verdict, which was, of course, a verdict affirming the issues in their terms. There was no doubt or uncertainty as to what the jury meant. Your Lordships did not reverse the judgment in that case, but ordered the appeal to stand over, and made a remit to the Court of Session, in order that an application might be made, if the party was so advised, to amend not the verdict, but the entry of the verdict; and LORD CHANCELLOR TRURO, in delivering judgment, said—"This appears to me to be little more than a misprision of the clerk in making the entry." The verdict was amended by stating that "the appellant did, by fraud, circumvention, and intimidation, procure the subscription to the writings." When the case came back your Lordships held, that the alteration in the entry of the verdict might be competently made; and my noble and learned friend LORD CRANWORTH, then LORD CHANCELLOR, said—"If it turns out that the mode in which a verdict has been entered up does not express that which the jury, upon the direction of the Judge, had intended to state, it is obvious that there must be some mode or other of getting that set right. Now that is what has happened here, because upon this remit application is made to the Lord Justice Clerk, and his report, as I interpret it, is to this effect:—'I did say, that unless the jury found, upon each and every of the instruments, that fraud, circumvention, and intimidation had taken place, they could not find a verdict for the pursuers generally. They have found a verdict for the pursuers generally.' Therefore, that is now set right."

Marianski's case, therefore, when carefully examined, is no authority for the amendment of an erroneous verdict, but was merely the correction of an erroneous entry of a proper verdict. The verdict in the present case, being a negative verdict, was wholly uncertain. It was explained to your Lordships very clearly, upon the former occasion, that it might mean any one of several different things, and that it was impossible to do more than conjecture which was intended by the jury. I apprehend that the Judges in this country would have no power to amend a verdict of this ambiguous and uncertain character entered precisely as it was delivered by the jury. The proper course would have been, at the trial, for the Judge to have refused to receive it, and to have sent the jury back with directions to find specifically one way or the other upon the issues. If such a verdict had been received *per incuriam*, the only remedy would have been for the Court to have granted a new trial.

And this appears to have been the proper course for the Court of Session to have pursued in this case, according to the high authority of Lord Commissioner Adam in his treatise on Trial by Jury. He says—"A verdict which is ambiguous or inconsistent, has not the character either of a verdict where the jury have mistaken the import of the proofs, or committed an error or misfeasance in any other respect; neither is it like a verdict which is to be set aside on account of the mistake of the Judge in administering the law. In all such cases of error, whether by the jury or by the Judge, the defect of the verdict is to be made out, and not by anything that appears upon the face of the verdict—that is, from the terms in which it is expressed. But in the case of a verdict which is ambiguous or inconsistent, its effect is to be derived, and only to be derived, from the terms in which it is expressed. It is a written document submitted to the legal consideration of the Court, and always to be construed by the legal wisdom and faculties of the Court. The Court alone is the tribunal which must say, whether the verdict is ambiguous or inconsistent or not. If it is not ambiguous or inconsistent, it must be applied, and judgment must proceed upon it. If the Court is of opinion that it is ambiguous, the ambiguity, imperfection, or inconsistency, cannot be remedied by the Court changing the expressions of the verdict, as in that case the Court would encroach upon the province of the jury. The only redress which they can administer is ordering another trial."

The amendment, therefore, of the defective and equivocal verdict in the present case cannot be sustained.

But assuming that the Court of Session possessed the power of amendment, the next question is, How has it been exercised? And here it appears to me that the Court of Session has not resorted to the proper materials by which to amend, or at least has not confined itself to them, but has gone far beyond the limits which it ought to have assigned to itself, and has made a new verdict for the jury.

In the interlocutor of the 21st of February 1856 this is strongly exemplified. Your Lordships

will find that it is said—"The Lords find that such amendment of the entry of the verdict is competent under the remit from the House of Lords, if otherwise competent in point of law, and within the jurisdiction and functions of the Court. Further, find that it is competent for the Court, after a verdict has been taken down in terms which are uncertain or ambiguous, to consider and examine the notes of the evidence, and the summing up of the Judge, with the report of his opinion, in order to ascertain, provided they have clear materials for doing so, the true meaning of the jury, according to the actual substance of the questions at issue between the parties on the evidence adduced, so as to enter the verdict in the form and manner adapted to the truth and reality of the case."

There is no doubt of what the jury actually found, but the Lord Justice Clerk gives an inference of his own of their opinion and intention, which is adopted by the Court. Acting upon these views, they take the verdict of the jury, and then interpret it in their own sense, drawing a conclusion which is by no means warranted by the premises. If, as the Judges say in their interlocutor, "substantially one point, and one point only of importance, was in dispute between the parties, and on which the answer to each issue equally depended, namely, whether the father of the pursuers, called in the evidence James Morgan of Fettercairn, was the brother of Thomas Morgan, brewer in Dundee, the father of the deceased John Morgan, whose succession, heritable and moveable, is in dispute in this process of multiplepoinding, and that if the pursuers failed to prove, to the satisfaction of the jury, that the said James Morgan was the brother of the said Thomas Morgan, it followed, according to the evidence in the trial, that a verdict finding that the case of the pursuers is not proven, clearly imported, in the intention and opinion of the jury, that a negative answer must be returned equally on each of the issues." If that really had been the one and only point, the Judges would have been perfectly right, from the general negative finding, in deducing a specific negative finding to each of the issues; but from the evidence it appears that there were other brothers of Thomas Morgan, the father of the deceased, of whose existence proof was given, and who would have preceded Alexander Morgan in the line of heritable succession. It is said that the issues, which were general as to Alexander being the heir, and as to Alexander and James being the next of kin, were made specific, and limited to a precise proof of heirship and of next of kin, by the condescendence, which alleged that James Morgan, the father of the claimants, was brother german of Thomas Morgan, who was father of John Morgan, the deceased. But it is most important always to bear in mind that the question to be tried is involved in the issues, and in these alone, and that you are not at liberty to go out of them for the purpose either of limiting the inquiry, or of defining with more punctuality the points to be determined by the jury. This was strongly put by my noble friend, LORD BROUGHAM, in the case of *Leys, Masson, and Co.* v. *Faulds*, in 5 W. S. 403. My noble and learned friend says—"This issue, as framed, becomes the order of the Court, and being sent down to be tried by a jury, it is too late—with very great submission I speak to some of the learned Judges who appear ultimately to have dealt with this question—it is too late for the Court to say, and it is past all doubt too late for the counsel to contend, that your Lordships, or that the Court, or that Lord Gillies and the jury who tried the cause, had anything to do with the condescendence and the answers, out of which, in point of fact no doubt, but accidentally for the purpose of this argument, the issue arose that was so framed. Not only have they nothing to do with them, but it is too late to have to do with them, and they have no business to ask about them. The issue precludes them from saying a word upon what appears in the condescendence and answers, as much as the record of an act, after the bill has become an act, precludes any Court of law dealing with an act from looking back to the bill out of which that act arose, or by referring to the speech of the honourable or noble person who may have introduced it, or to their conversation with an individual, by which it might be made to appear, if you could get at it, (which you never can,) that the meaning was so and so, when the only question is, not what he meant, but what the law intends; in another sense of the word, what the law fixes as the legal meaning of the words which the legislature, possibly upon his instigation, possibly in spite of his efforts, may have thought fit to use in framing the law arising out of his bill or proposition. This I think of great importance, to be attended to by the Court, by Judges, and practitioners. You are as much precluded from going out of the issue framed by the officer and adopted by the Court, as you are precluded from construing an act, from going out of the four corners of the statutes and looking into the bill, or *dehors* of the bill, to gather the meaning."

Adhering, then, to the issues as framed, and rejecting the suggested explanatory aid of the condescendence, the evidence introduces other elements than the mere fact of James not being the brother of Thomas, to disprove the case of the claimants; and the Court cannot draw the consequence which it has done from the finding, "That the case of the pursuers is not proven," that they have failed of proof on each of the issues. The amendment, therefore, is not warranted by what was before the Court, even if they had the power to amend.

It only remains to consider what your Lordships ought to do under the circumstances. It would be vain to remit the case to the Court of Session in the same manner as before, without any specific direction, because it is now clearly seen, that there is an inherent error in the

proceeding; that the verdict is substantially defective; and that, even if the power of amendment existed then, there are no means of ascertaining with certainty what the jury meant to say, nor any materials by which the verdict can with propriety be amended. The utmost that can be done for the parties is to direct a new trial, on which this unfortunate miscarriage has taken place.

I should have entertained no doubt of the power of the House to adopt this course if it had not been for the opinion of my noble and learned friend, LORD ST. LEONARDS, when this case was before your Lordships on the previous occasion. He thought that for this House to order a new trial would be contrary to the provisions of the Scotch Judicature acts; but there seems to me to be a short answer to that objection. By § 19 of the 59th Geo. III. cap. 42, the House of Lords may direct issues to be tried. Your Lordships might, therefore, have directed these very issues. May you not, then, order a new trial of issues already framed, which you might have directed to be tried originally? This reduces the whole question to one merely of form. It seems to me that there is no other mode of extricating the parties from the embarrassment in which these proceedings are involved; and though I am reluctant to increase the expense which has been already incurred by this hitherto unfruitful litigation, I fear that it is the only course now left open, and therefore I must recommend that the interlocutor be reversed, and a new trial directed.

LORD BROUGHAM.—My Lords, I take exactly the same view of this case with my noble and learned friend. I will not trouble your Lordships with any further remarks upon it, except to say, that I join in the reluctance which my noble and learned friend has expressed at prolonging the expense of this litigation; but it is inevitable. We cannot help it. We have no other mode of proceeding. Although there might, I think, be some doubt as to the competency of this Court of Appeal to direct a new trial, I agree with my noble and learned friend, that the difficulty and difference resolve themselves into a difficulty and difference of form only. Therefore I entirely concur in the course proposed by my noble and learned friend.

LORD CRANWORTH.—My Lords, I have little or nothing to add to the exposition which my noble and learned friend on the woolsack has given of this case. I will, however, just revert to what took place when the matter was before your Lordships on the former occasion. Your Lordships will recollect that the first intimation of opinion of your Lordships then was, that the case must be remitted to the Court of Session with a declaration, that there should be a new trial. But it was then suggested at the bar, that it might be possible to avoid the necessity of a new trial by getting the record amended according to what had been decided by your Lordships when Lord Truro was Lord Chancellor, namely, that there was a power to amend clerical errors in the Court of Session as well as in all other Courts. After, therefore, your Lordships had expressed your opinion that the case must go back to be retried, that question was shortly discussed by your Lordships, and I had no hesitation in yielding to that suggestion to this extent simply, that instead of saying, that there should be a new trial, the cause should be remitted to the Court of Session with a direction that they should do what justice required to be done, leaving it entirely open whether it was possible to make such amendment. I have not before me at the present moment the report of what then took place; but if it is supposed, that it was intended to intimate an opinion, that the Court could in any respect whatever alter the verdict, certainly what was then said was quite misunderstood. The error which had occasioned the appeal was this: There were two propositions maintained by the pursuers—first, that Alexander Morgan is heir; and secondly, that Alexander and James are next of kin. Your Lordships were of opinion, and, as I think, not only upon legal but upon perfectly logical reasoning, that the verdict was an unsatisfactory one, because, when the jury only said it is not proven that Alexander is heir, and that Alexander and James are not next of kin, it was quite consistent with that verdict that Alexander was heir, but that Alexander and James were not next of kin, or the correlative proposition; and that being so, it was impossible to say what the jury did really intend to find. But supposing the notes of the learned Judge who tried the case had proved this, that the jury, in returning their verdict, had said, We find, first, that it is not proven that Alexander is heir; and, secondly, that it is not proven that Alexander and James are next of kin; and that the clerk, either of his own authority, or by the direction of the Judge, had said, "Then enter that as a general verdict, not proven," it might be quite reasonable to correct that, because the jury had given their verdict rightly, and the correction would only have been to put into correct language what the jury had really found. Now every Court has an inherent power to do that. It is only natural and reasonable to suppose, that if the jury returned their verdict right, and the clerk entered it incorrectly, the Court would have the power to correct that which had been erroneously entered. But that is not what the Court of Session proceeded to do in this case. They have proceeded not to correct the entry of the verdict, as my noble and learned friend has put it, but starting from the proposition, that the jury found the verdict in the precise terms in which it is entered, the learned judges have proceeded to consider from the notes of the learned Judge who tried the cause, what it is that they think the jury must have meant. Now that is taking upon themselves to do something which no Court can possibly have

the power to do—at least no Court administering justice by means of trial by jury, for it makes the verdict the verdict of the Court, and not the verdict of the jury.

I consider, therefore, that this is an attempt on the part of the Court, originating in a very laudable desire, on their part, to save the parties the expense of unnecessary litigation, but still an attempt to do that which was altogether *ultra vires.*

Further, I entirely concur with my noble and learned friend, that even if it were not *ultra vires*, it does not put the case in one particle better position than it was in before; because, suppose the jury had returned the verdict in the very words in which it is now entered, it would still have been equally open to the charge of ambiguity, for they "say upon their oath, that they find the case for the pursuers is not proven, and, therefore, that upon the first issue they find it is not proven, that the pursuer, Alexander Morgan, is nearest and lawful heir of John Morgan; and, upon the second issue, that they find it is not proven that the pursuer, James Morgan, is, along with Alexander Morgan, next of kin of John Morgan." That is, it is given as a logical corollary, from finding that the whole case is not proven—that each and every part of it is not proven. That is just open to the very same complaint to which the former finding was open. Therefore I do not think it would have helped the case, even if we had not come to the conclusion, that what the Court has attempted to do is *ultra vires.*

As to the other point, to which my noble and learned friend has referred, I confess, that I have no doubt, upon the construction of the act, that when this House says, that there ought to be a new trial, it is in the power of the House to direct it at once. I do not even think it necessary to recur to the reasoning of my noble and learned friend founded upon the consideration, that we might have directed an issue. I say at once, that this being an appeal to this House, the House is to do justice, which can only be done here by having this unfortunate case re-tried, unless, indeed, the parties have some grains of common sense remaining; and now, that I believe not only the oyster,[1] but the greatest part of the shells, are exhausted, they will take care not to put themselves to any further expenses.

Mr. Solicitor-General.—Before your Lordship puts the question as to costs, your Lordship will forgive my suggesting that the appellants would be entitled to the costs of the proceeding which they took in the Court below, and which your Lordships now have held to be right, to apply the judgment of your Lordships upon the former occasion. The Court below refused so to apply it, but your Lordships have now held that to be the proper mode of applying that judgment.

Mr. Anderson.—We ought to get the costs below. The Court below ought to have given the costs against the respondents.

Lord Advocate.—Your Lordships will bear in mind that no costs were given of this proceeding to either party in the Court below. They were allowed to abide the issue of the cause, and I apprehend they still ought to be allowed to abide the issue of the cause.

LORD BROUGHAM.—We say nothing about costs.

The *order* of the House was as follows:—"Ordered and adjudged, that the said interlocutors complained of in the said appeal be, and the same are hereby *reversed:* And it is further ordered and adjudged, that the cause be, and is hereby remitted back to the Court of Session in Scotland, with instructions to that Court to give the necessary directions for a new trial of the issues for the appellants in the pleadings mentioned."

John Shand, W.S., *Appellants' Agent.*—Webster and Renny, W.S., and Adam and Kirk, W.S., *Respondents' Agents.*

MARCH 15, 1859.

THE BARGADDIE or BARTONSHILL COAL COMPANY (Robert Paterson, J. B. Neilson, &c.), *Appellants*, *v.* ROBERT WARK, *Respondent.*

Proof—Evidence, Parole—Lease of Coal—Confidentiality—Varying Written Lease by Parole—Rei interventus—*A proprietor who had, by a written contract of lease, let the coal under his lands to lessees, who, in terms thereof, were restricted from working within* 15 *feet of the boundaries, on the allegation that this stipulation had been violated, brought an action to have the lessees compelled to erect a barrier or wall of equal thickness. The lessees, who were also tenants of the coal in the adjoining land, averred, that the lessor had consented to allow them to work*

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[1] His Lordship no doubt here alludes to the result of the appeal, *Magistrates of Dundee* v. *Morris*, 3 Macq. Ap. 134; 30 Sc. Jur. 528; *ante*, p. 747.